SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2161-15T1

J.D.,

Plaintiff-Appellant/
Cross-Respondent,

and

T.J.,

Plaintiff,

v.

PERFORMANCE PHYSICAL THERAPY AND SPORTS CONDITIONING, and BRAD SAMPLES,

Defendants-Respondents/
Cross-Appellants.

Argued February 13, 2018 – Decided April 13, 2018

Before Judges Hoffman, Gilson, and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-3591-12.

William L. Gold argued the cause for appellant/cross-respondent (Bendit Weinstock, PA, attorneys; William L. Gold, on the briefs).

Mark S. Kundla argued the cause for respondents/cross-appellants (Hardin, Kundla, McKeon & Poletto, PA, attorneys; Mark S. Kundla, of counsel and on the brief; Jennifer Suh and Eileen Bass Rudd, on the brief).

PER CURIAM

Plaintiff J.D.[1] injured her shoulder and a nerve that required corrective surgery. Following the surgery, she was treated with physical therapy performed by defendant Dr. Brad Samples at his practice, Performance Physical Therapy and Sports Conditioning (Performance PT). Plaintiff sued defendants contending that they committed physical therapy malpractice resulting in the failure of her surgery.[2] A jury found no cause of action because defendants had not deviated from the standard of care for physical therapists. The jury verdict was memorialized in an order of judgment entered on November 10, 2015. Plaintiff appeals and defendants cross-appeal. We affirm because we discern no error warranting the reversal of the jury verdict.

[1] We use initials to protect plaintiff's privacy interests. See R. 1:38-3(d)(10).

[2] Plaintiff's husband, T.J., also asserted a per quod claim. Plaintiff and her husband were married after she received physical therapy treatments from defendants. In October 2013, the court granted a motion for summary judgment dismissing plaintiff's husband's claims. There is no appeal from that order.

I.

In September 2010, plaintiff, who was a registered nurse, was injured while working. She attempted to lift a patient and injured her shoulder and the long thoracic nerve in her back. The nerve injury caused scapular winging of her right shoulder blade. Scapular winging results from damage to the muscle or nerve that controls the scapula, which sits along the back shoulder and supports the shoulder blade when a person lifts his or her arm. When the nerve or muscle is damaged, the scapula pushes out causing "winging" because it does not sit smoothly on the back.

After receiving non-surgical treatment, plaintiff saw Dr. Andrew Levy who recommended split pectoralis tendon transfer surgery. Plaintiff sought a second opinion from Dr. William Levine, and then agreed to the surgery.

Dr. Levy performed the surgery in July 2011. Split pectoralis tendon transfer surgery entails a surgical stretching of the sternal head of the pectoralis major muscle back to the inferior border of the scapula (shoulder blade), which substitutes for the lost serratus anterior muscle. In addition, a graft is sometimes used to bridge the gap between the bone and the tendon, providing structure to the pectoralis tendon.

Following the surgery, in August 2011, Dr. Levy gave plaintiff a prescription for physical therapy. The prescription called for

physical therapy three times a week for four weeks. The prescription stated that plaintiff was "post" split pectoralis tendon transfer surgery, and called for "active and passive forward flexion to ninety degrees" and "external rotation to . . . thirty degrees while stabilizing the scapula." The prescription also required electronic stimulation.

Before starting physical therapy, on August 26, 2011, plaintiff was involved in an incident with her former boyfriend. Plaintiff reported that her boyfriend shoved her in her chest, causing her to stumble backwards, hit a door, and land on the floor. Plaintiff also explained that she felt some pain in her shoulder after the incident. Plaintiff did not report that incident to her treating physicians.

Plaintiff began physical therapy on August 29, 2011. In that initial visit, she met with Dr. Samples who evaluated her. Thereafter, plaintiff received physical therapy on September 1, 2, 6, 9, and 13, 2011.

On September 14, 2011, plaintiff had a follow-up visit with Dr. Levy, who wrote a second prescription for physical therapy. That prescription called for the physical therapist to "stabilize [plaintiff's] scapula manually during cuff strengthening." Dr. Levy explained that cuff strengthening required placing the hand on the shoulder blade and holding it into place to strengthen the

smaller muscles before building up the larger muscles. Plaintiff returned for physical therapy sessions on September 16, 20, and 22, 2011.

On September 23, 2011, plaintiff saw Dr. Samples for another physical therapy session. She testified that she was asked to perform three exercises with weights. Plaintiff also testified that Samples failed to stabilize her scapula with his hands while she was attempting those exercises. Plaintiff went on to explain that she was unable to complete the exercises because they caused her pain.

There was disputed testimony concerning how and when plaintiff reported her pain after physical therapy on September 23, 2011. Defendants also disputed that plaintiff reported any pain while she was at physical therapy on September 23, 2011.

The records of Dr. Levy show that plaintiff called his office on September 27, 2011, to report that she was in pain and that the pain began on September 24, 2011. Dr. Levy's records also stated: "Call was placed to the physical therapy center who stated that they are 'doing the best they can.' They admitted she is lifting weights without scapular stabilization but 'only when standing.'"

The next day, on September 28, 2011, Dr. Levy called Dr. Samples and his notes stated:

> [P]hone conference noted . . . today contacted[] the therapist who admitted patient was instructed to do standing straight arm lifts with [three pounds] without scapula stabilized . . . stating he is 'trying to do the best he can' and '[we are] very busy when she's here[.]' [He] acknowledged the []written instructions about manually stabilizing scapula and verbal confirmation from [N]icki.

Dr. Levy then directed plaintiff to stop physical therapy and he ordered magnetic resonance imaging (MRI).

The MRI showed that the tendon graft had pulled away from the scapula. Thus, Dr. Levy concluded that the split pectoralis tendon transfer surgery had failed. At trial, he testified that the failed surgery was due to Dr. Samples' non-compliance with the post-operative instructions.

In October 2011, plaintiff underwent a second surgery to repair her scapula. That second surgery was also performed by Dr. Levy. Following the second surgery, plaintiff did not see defendants for physical therapy.

In July 2012, while plaintiff was at her home, she opened the door to a wardrobe and a piece of broken wood fell down. Plaintiff put her right arm up to brace herself, and the broken wood fell and slid down the right side of her back. Plaintiff went to the emergency room. The following day, plaintiff made an appointment with Dr. Levine. When the doctor saw plaintiff, he noted a reoccurrence of scapular winging.

In August 2013, plaintiff was at work when she extended her right arm and felt a sharp "crunching sensation," and experienced "intense severe pain." She saw Dr. Levy in September 2013, who concluded that her second surgery had failed.

In August 2012, plaintiff sued defendants Samples and Performance PT alleging physical therapy malpractice. The parties engaged in discovery, which included discovery related to various proposed experts.

As the case was getting ready for trial, the parties filed a series of in limine motions. Among other things, plaintiff sought (1) a directed verdict on the issue of deviation from the physical therapy standard of care, (2) an order barring defendants' expert Patrick Hoban from offering any testimony or, in the alternative, limiting his testimony, and (3) an order precluding defendants from questioning plaintiff at trial about the incident involving her boyfriend in August 2011.

The trial court denied plaintiff's motion for a directed verdict. The trial court also granted in part and denied in part plaintiff's motion to preclude testimony from defendant Samples' physical therapy expert, Patrick Hoban. The court ruled that Hoban could not provide testimony as to proximate cause, but could provide testimony concerning the standard of care. The court also

granted plaintiff's motion to bar testimony regarding the incident involving plaintiff's boyfriend.

A ten-day jury trial was conducted in October 2015. Both sides presented testimony from numerous witnesses, including various expert witnesses. Among the witnesses the jury heard from were defendant Samples and Patrick Hoban.

When defendant Samples was called, plaintiff objected to his testimony concerning his background and credentials. The trial court overruled plaintiff's objection, then qualified Samples as an expert. The court, however, limited Samples' testimony and ruled that Samples could not opine on the standard of care or whether he conformed to that standard.

With regard to Hoban, the trial court denied in part and granted in part plaintiff's motion to bar certain portions of his testimony. The court precluded Hoban from testifying about causation. Over plaintiff's objection, the court allowed Hoban to offer testimony concerning the physical therapy standard of care. Hoban testified that defendants followed Dr. Levy's prescription for physical therapy and that Samples had done a good job in treating plaintiff.

During jury deliberations, the jury sent out a note stating: "physical therapy standard of care." After conferring with counsel, the trial court re-read a portion of model jury charge

5.50A on duty and negligence. All counsel agreed to that response to the jury's note.

Thereafter, the jury returned its verdict, finding no deviation from the standard of care by defendants. An order of judgment memorializing the jury verdict was entered on November 10, 2015.

Plaintiff filed a motion for a new trial. After hearing oral arguments, the trial court denied that motion in an order entered on January 10, 2016.

Plaintiff appeals and defendants cross-appeal. Defendants' cross-appeal addresses issues that will only become ripe if we reverse the jury verdict and remand for a new trial. Thus, we will first address plaintiff's appeal and, thereafter, we will address defendants' cross-appeal.

II.

On her appeal, plaintiff makes ten arguments, contending: (1) it was an error to allow defendant Samples to testify as an expert; (2) defendant Samples' expert testimony created a conflict with the jury instructions on duty and negligence; (3) defendant Samples' expert, Patrick Hoban, should have been barred from testifying; (4) Hoban was not qualified to give an expert opinion on the standard of care; (5) plaintiff is entitled to a new trial because of improper expert testimony; (6) the verdict was against

the weight of the evidence; (7) plaintiff's motion for a directed verdict and for a new trial should have been granted; (8) on remand, plaintiff is entitled to a directed verdict on proximate cause; (9) it was an error to charge the jury on comparative negligence; and (10) plaintiff is entitled to a new trial because of improper comments by defense counsel in his closing arguments.

We are not persuaded by any of these arguments. Several arguments are related and, therefore, we have organized and will analyze the arguments in six discussions: (1) testimony by defendant Samples; (2) the jury instruction on expert testimony; (3) expert testimony by Hoban; (4) the jury instruction on comparative negligence; (5) defense counsel's comments in closing arguments; and (6) whether plaintiff is entitled to a new trial.

1. Testimony by Samples

Plaintiff argues that the trial court erred in qualifying defendant Samples as an expert and allowing him to offer opinions. The determination to admit testimony, including expert testimony, is committed to the sound discretion of the trial court. Innes v. Marzano-Lesnevich, 435 N.J. Super. 198, 247 (App. Div. 2014) (citing Carey v. Lovett, 132 N.J. 44, 64 (1993)). "Absent a clear abuse of discretion, an appellate court will not interfere with the exercise of that discretion." Ibid.

"It is well-established in this state that a defendant doctor in a medical malpractice case can give opinion evidence in describing his [or her] care and treatment of the plaintiff, including any opinion the doctor may have concerning his [or her] adherence to accepted standards of care." Velazquez ex rel. Velazquez v. Portadin, 321 N.J. Super. 558, 577 (App. Div. 1999), rev'd on other grounds, 163 N.J. 677 (2000). In that regard, our Supreme Court has explained:

> Nothing . . . prevents a medical doctor from testifying as an expert in his own case. Neither [N.J.R.E. 703, N.J.R.E. 702], nor case law prohibits a defendant from testifying as an expert witness on his own behalf if the defendant is otherwise qualified . . . . The test of an expert witness' competence in a malpractice action is whether he or she has sufficient knowledge of professional standards to justify the expression of an opinion. The weight of any such testimony, of course, is for the jury.
>
> [Carey, 132 N.J. at 64-65; see also Stigliano v. Connaught Lab., Inc., 144 N.J. 305, 312-16 (1995).]

The defendant doctor in a medical malpractice case is permitted to state reasons why he or she took certain actions and to explain the treatment provided to the patient. Velazquez, 321 N.J. Super. at 579. To the extent that such testimony constitutes opinion testimony, there is no error. Ibid. Indeed, a treating physician defendant does not always need to be listed as an expert.

See Ginsberg v. St. Michael's Hosp., 292 N.J. Super. 21, 32-33 (App. Div. 1996).

In this case, defendant Samples testified on his own behalf. When Samples was questioned about his education and experience, plaintiff objected. The trial court ruled that if defendant was going to give opinion testimony, he must be qualified as an expert. Although defense counsel did not originally plan to offer Samples as an expert, he tendered Samples as an expert in physical therapy. Following voir dire questioning, the court ruled that defendant was qualified to testify as an expert. The court, however, limited Samples' testimony and directed that he was not permitted to offer opinions on the standard of care or whether he conformed to that standard.

Samples then testified that he had not treated a patient with a split pectoralis tendon transfer surgery before, and he had not learned about that type of surgery in physical therapy school. He explained that he looked into medical texts to learn about the necessary treatment. Samples then described the physical therapy treatment he provided to plaintiff.

We discern no error in the trial court's admission of Samples' testimony, including qualifying him as an expert. Plaintiff also argues that Samples was not qualified because he had never previously treated plaintiff's particular condition. That fact

did not prevent Samples from being appropriately qualified as an expert in physical therapy. Moreover, plaintiff had the opportunity to point out Samples' lack of experience on cross-examination, and to make arguments to the jury about his particular treatment of plaintiff.

The parties also dispute whether Samples actually gave opinion testimony concerning the standard of care and his adherence to that standard. The trial court had made a ruling prohibiting such testimony, and was in a position to monitor and enforce that ruling. Furthermore, even if some of the testimony strayed into those areas, we discern no reversible error since physicians who are defendants in malpractice actions are allowed to give such testimony when qualified.

2. The Jury Instruction on Expert Testimony

Plaintiff next asserts that qualifying defendant as an expert created a conflict between the jury instructions for "expert testimony" and "duty and negligence." Specifically, plaintiff contends that qualifying Samples as an expert contradicted the charge that the jury was not to use "the personal subjective belief or practice of the defendant" in determining his compliance with the standard of care. See Model Jury Charge (Civil), 5.50A, "Duty and Negligence" (2002). Moreover, plaintiff argues that when defendant was qualified as an expert, that ruling suggested to the

jury that Samples had abilities far beyond the average physical therapist.

We evaluate jury charges in their entirety. If the charge as a whole adequately presents the law and would not tend to confuse or mislead the jury, we will not reverse a jury verdict. See Conklin v. Hannoch Weisman, PC, 145 N.J. 395 409 (1996) (citing Stackenwalt v. Washburn, 42 N.J. 15, 26-27 (1964)). Furthermore, when the appellant fails to object to the charge, we review such a charge for plain error. See R. 2:10-2.

Here, the trial court charged the jury using Model Jury Charge 5.50A. The judge reviewed that charge beforehand with counsel and plaintiff's counsel did not object to the charge. The trial judge then instructed the jury that it was their responsibility "to resolve any conflicts in the testimony of the experts," and to determine the experts' credibility. The judge also instructed the jury that they must evaluate the facts on which an expert witness based his or her opinion, and "[w]hen determining the applicable standard of care, [the jury] must focus on the accepted standards of practice in physical therapy and not on the personal subjective belief or practice of the [d]efendant physical therapist."

During deliberations, the jury sent a note to the court concerning the physical therapist's standard of care. After discussing that note with trial counsel, the court re-read a

portion of Model Jury Charge 5.50A on the standard of care. Plaintiff's counsel did not object to that response.

Having reviewed the testimony and the jury charge, we discern no error, and certainly no plain error, warranting the reversal of a jury verdict.

3. Expert Testimony by Hoban

In evaluating the admissibility of expert testimony, our Supreme Court has explained that "(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony." Townsend v. Pierre, 221 N.J. 36, 53 (2015) (quoting Creanga v. Jardal, 185 N.J. 345, 355 (2005)).

If, however, an expert's conclusions are not supported by factual evidence or other data, such testimony is not admissible under the "net opinion" rule. Id. at 55. Accordingly, for expert opinions to be admissible, expert witnesses must "be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and methodology are reliable." Ibid.

Here, Hoban was offered as an expert in physical therapy. Plaintiff objected, arguing that Hoban was not licensed to practice

physical therapy in New Jersey and, thus, he could not opine on New Jersey's standard of care for physical therapy. The trial judge rejected that argument reasoning that Hoban was an expert in the field of physical therapy and that he could describe the national standard of care. The trial judge also noted that plaintiff could challenge his credibility and that it would be for the jury to determine the weight to give to his testimony. The trial judge limited Hoban's testimony and directed that he not testify regarding proximate cause.

Accordingly, at trial Hoban testified concerning the standard of care, explaining that he was using the national standard based on skills developed through education and training. Hoban then explained that his testimony and conclusions were based on his review of the records in this case and his knowledge and experience as a physical therapist.

As noted earlier, the admission or exclusion of expert testimony is committed to the sound discretion of the trial court. Innes, 435 N.J. Super. at 247. Having reviewed plaintiff's arguments in light of Hoban's testimony, we find no abuse of discretion and, therefore, find no error in the trial court's decision to allow Hoban to testify as an expert.

4. The Jury Instruction on Comparative Negligence

Plaintiff next contends that the trial court erred in instructing the jury to assess comparative negligence. Plaintiff fails to cite to the particular charge that she contends instructed the jury on comparative negligence and she also fails to present any citation to law that is directly related to the charge that was actually given. Indeed, during the charge conference, the trial judge stated "I had my thought [to] print [Model Jury Charge] 7.10 Contributory Negligence; 7.3 Comparative Negligence; 7.31 and 7.32 Comparative Negligence, [but] they're all out." A review of the actual jury charge given by the trial judge does not reflect any mention of comparative negligence.

Instead, the court used the Scafidi[3] charge for proximate cause in cases involving pre-existing injuries. See Model Jury Charge (Civil), 5.50E, "Pre-existing Condition — Increased Risk/Loss of Chance — Proximate Cause" (2014). That charge requires the jury to determine (1) whether defendant deviated from the standard of care, (2) that the deviation increased the risk of harm posed by the pre-existing condition, and (3) that the increased risk was a substantial factor in causing plaintiff's ultimate injury. Ibid. A defendant would then be responsible for

[3] Scafidi v. Seiler, 119 N.J. 93 (1990).

all of plaintiff's injuries unless he or she could prove (4) "what portion of plaintiff's injuries were the result of the pre-existing condition." Ibid.

Given the evidence and testimony presented at trial, we find no error in the court's use of the Scafidi charge. Indeed, it was plaintiff's counsel who requested the Scafidi charge.

Finally, this argument is not a basis for reversing the jury verdict. The jury found that defendant Samples did not deviate from the standard of care. Consequently, the jury never reached the issue of apportionment or comparative negligence.

5. Defense Counsel's Comments

In making closing arguments, counsel are accorded broad latitude, but their arguments must be "fair and courteous, grounded in the evidence, and free from any 'potential to cause injustice.'" Risko v. Thompson Mueller Auto. Grp., 206 N.J. 506, 522 (2011) (quoting Jackowitz v. Lang, 408 N.J. Super. 495, 505 (App. Div. 2009)). Accordingly, counsel should not make statements that would undermine the jury's deliberations. Id. at 522-23. In considering whether to grant a new trial because of improper comments by counsel, the court will consider whether opposing counsel objected and whether the judge gave a curative instruction. Id. at 522-24.

During defense counsel's closing argument, counsel stated: "Conduct, what do I mean by conduct? For you to find for the plaintiff you would have to find that [defendant] knowingly and deliberately prescribed exercises that put his patient at risk. Is that the type of person that you saw on the stand?" Plaintiff's counsel did not immediately object, but during a subsequent break, plaintiff's counsel did object to the comment. The trial judge noted that plaintiff's counsel should have objected to the statement when it was made, but agreed to give a generalized instruction to the jury regarding both parties' closing arguments. The trial judge then reminded the jury that the lawyers were advocates for their clients, statements they made during their openings and closings were not evidence, and their comments were not binding on the jury.

Furthermore, in its instructions to the jury, the court explained that plaintiff must prove, by a preponderance of the evidence, that defendants deviated from the standard of care, increased plaintiff's risk of harm, and that such increased risk was a substantial factor in plaintiff's ultimate injury and damages. The trial court never instructed the jury that plaintiff had to prove knowing and deliberate action by defendants.

Having reviewed defense counsel's comments in context, we find no error warranting a new trial. The trial court instructed

the jury on the proper standard of care. Moreover, the trial judge informed the jury that nothing counsel said was evidence and that "any statements by the attorney[s] as to what the law may be must be disregarded by you if they are in conflict with my charge . . . or my instructions." Consequently, the comment made by defense counsel did not have the capacity to improperly influence the jury's ultimate decision-making responsibility. See Risko, 206 N.J. at 522-23.

6. Whether Plaintiff Is Entitled to a New Trial

"A new trial may be granted . . . if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law." R. 4:49-1. Accordingly, the trial court must take into account "not only tangible factors . . . as shown by the record, but also appropriate matters of credibility, generally peculiarly within the jury's domain, . . . and the intangible 'feel of the case' . . . gained by presiding over the trial." Innes, 435 N.J. Super. at 224 (quoting Dolson v. Anastasia, 55 N.J. 2, 6 (1969)). In considering a motion for a new trial, the court is not permitted to "substitute [its] judgment for that of the jury merely because [it] would have reached a different outcome." Berkowitz v. Soper, 443 N.J. Super. 391, 411-12 (App. Div. 2016). The law is well-settled that judges

are not permitted to act as "a thirteenth and decisive juror." Id. at 412 (quoting Dolson, 55 N.J. at 6).

We review appeals from decisions on motions for a new trial by the same standard governing the trial judge – whether there was a miscarriage of justice under the law. Hayes v. Delamotte, 231 N.J. 373, 386 (2018). In doing so, however, we give "due deference" to the trial court's "feel of the case." Ibid.

Plaintiff makes a series of arguments contending that she is entitled to a new trial because of the improper admission of expert testimony and because, in her view, there was no evidence contradicting her contention that defendants deviated from the standard of care. The trial judge denied plaintiff's motion for a new trial. We discern no error in that ruling. In short, plaintiff is asserting her view of the facts disregarding that the jury legitimately developed a different view based on properly admitted evidence.

7. Plaintiff's Remaining Arguments

Plaintiff also argues that she is entitled to a directed verdict on proximate cause if the matter is remanded. Because we find no basis for remanding the matter, this argument is moot. Plaintiff's remaining arguments, to the extent that they have not been addressed, lack sufficient merit to warrant a discussion in a written opinion. See R. 2:11-3(e)(1)(E).

III.

On their cross-appeal, defendants make four arguments. They contend that the trial court erred in (1) charging the jury with Model Charge 5.50E, rather than Model Charge 6.14; (2) precluding defendants from questioning plaintiff regarding certain topics; (3) precluding defendants from introducing evidence related to the incident involving plaintiff's boyfriend; and (4) denying defendants' motion for an involuntary dismissal at the close of plaintiff's case. As noted earlier, all of these issues would only become ripe if we reverse the jury verdict and remand for a new trial. As we are affirming, there is no need to address defendants' arguments.

Affirmed.